

TESTIMONY OF ARMAND MINTHORN  
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UMATILLA INDIAN RESERVATION

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

ON NAGPRA OVERSIGHT HEARING

Good morning, Mr. Chairman, and members of the Committee. I am Armand Minthorn, member of the Board of Trustees and chair of the Cultural Resources Commission of the Confederated Tribes of the Umatilla Indian Reservation. Over the past three years, I have served on the Review Committee established by the Native American Graves Protection and Repatriation Act (NAGPRA). At the April, 2000, Review Committee meeting, I was named the Interim Chair of that committee. During my service to the Tribe as well as to the Review Committee, I have witnessed first-hand the implementation of NAGPRA. What I have seen over the last two years has been disturbing. NAGPRA was passed to protect the human rights of Native American Tribes and individual lineal descendants. However, agency implementation--particularly that of the Department of the Interior--has failed to carry out the intent of NAGPRA making repatriation more difficult.

I would like to discuss four elements of the implementation of NAGPRA: (1) consultation with tribal governments; (2) the precedents established by the National Park Service's implementation of NAGPRA; (3) the Review Committee; and (4) the guiding Trust Responsibility of federal agencies towards the tribes. For illustration, I will use the case of The chaminsh Oytpamanatityt, or the "Kennewick Man," as he is more commonly referred to. We have been involved in this case since the first days of the release of the carbon dating results in 1996. Since then, we have struggled against the Department of the Interior, the Department of Justice, the Corps of Engineers and the media to have our voices heard and our rights respected. To date, we are not winning this battle.

First, when NAGPRA was passed in 1990, the legislation broadly announced that Native American Tribes do indeed have a right to protect their ancestors. The statute made it clear that the tribes are to be an integral component of the decision-making process through consultation. In the provisions of NAGPRA dealing with intentional excavation, inventories, summaries, and repatriation, consultation is required. The regulations written by Interior require that consultation be the foundation of the repatriation process. We are disappointed in the form and content of the consultation process Interior has decided to pursue in the "Kennewick Man" case. Rather than engage in collaborative decision-making or meaningful consultation as required by NAGPRA and Executive Order 13084, Interior has chosen instead to inform the five claimant tribes of the decisions made after-the-fact, and tried to convince us that they are doing this "for our own good." This is not consultation as required by NAGPRA. The decision by Interior to go forward with DNA analysis of the "Kennewick Man" is a good example of the failure of the consultation process. On February 18, 2000, the Department of the Interior made the final determination to conduct DNA analysis on the "Kennewick Man." All five claimant tribes--the Umatilla, Yakama, Nez Perce, Colville and Wanapum--uniformly opposed DNA testing, even to the point that we

were willing to go forward with a cultural affiliation determination without DNA results and defend that decision in court. Interior, however, decided that it was in its best interests to do those tests. They did so even though their own experts agreed with the tribes that DNA results could not possibly show cultural affiliation, and the insignificant likelihood of the presence of any viable DNA was grounds alone not to conduct the tests.

The precedent of using DNA evidence to show cultural affiliation struck a devastating blow to the pursuit of repatriation throughout the Native American community, a reality that is only now becoming clear. Interior's reliance on DNA testing is being construed as an open invitation to all federal agencies and museums to allow such testing on their collections. We have received requests, and are aware of other requests around the country, to do DNA analysis on Native American skeletons. While I will concede that there will be cases where testing is necessary, the decision must be made with the tribes, not for the tribes. Any other avenue removes the tribes from the repatriation process and is contrary to the intent of NAGPRA.

Interior has not only ignored the tribes in implementing NAGPRA. I serve on the Review Committee as the Interim Chair and recently we made recommendations to the National Park Service and Interior staff in furtherance of the implementation of NAGPRA. These recommendations for administrative reorganization have been ignored. On other occasions the Review Committee recommended additional appropriations to tribes for the implementation of NAGPRA, a recommendation the Park Service failed to support. In short, I have witnessed serious problems within Interior in their effort to insure compliance and implementation of the law. Something must be done to remedy this inadequate performance of Interior.

I would also like to discuss the Trust Responsibility of the federal agencies implementing NAGPRA. Certainly fulfilling the Trust Responsibility involves following the letter and the intent of the laws passed to benefit Indians. The Trust Responsibility requires more, however. It requires that the agency implementing the statute resolve ambiguities in the law in favor of tribal interests. Interior has not been acting in the best interests of the Tribes nor has it been making decisions which further the preservation of tribal culture. What should be a cooperative process is a constant battle and I cannot believe that the members of this committee that supported NAGPRA intended this result.

Interior's decisions directly conflict with the plain meaning and the intent of NAGPRA. Because of the nature of archaeology, a science based in part on conjecture, the further back in time you go, the more difficult it is to show a high level of certainty. We are not going to achieve certainty in this case. We acknowledge the difficulty in showing cultural affiliation for remains that are 9,000 years old. The "Kennewick Man" litigation has exposed the difficulty in achieving NAGPRA's intent in returning ancient remains to their claimant tribes. Nevertheless, we have submitted evidence which, under prevailing archaeological theories and NAGPRA, should be sufficient to indicate a cultural affiliation to our ancestor.

Unfortunately, we are now faced with scientists who wish to reexamine and redefine every theory about the peopling of the Western Hemisphere. Many new theories have little foundation, yet they wish to study, dissect and destroy our ancestors to prove or disprove these theories. This focus in

physical anthropology and archaeology has resulted once again in tribal ancestors being used as test subjects in experiments. Additionally, tribes are forced to disprove these theories in order to show archaeological continuity for cultural affiliation. NAGPRA placed the burden on the tribes to prove cultural affiliation to support a claim for repatriation. NAGPRA was not intended to force tribes to prove their entire history in order to justify repatriation.

Mr. Chairman, members of the Committee, today I have given you some disturbing news about how NAGPRA is being misapplied by agencies at the expense of the tribes, primarily to avoid litigation. I urge you to use whatever methods are at your disposal to inform these agencies that this is unacceptable. NAGPRA does not need to be amended to accomplish this. However, the agencies and museums implementing this statute must be made aware, in the strongest terms possible, that NAGPRA was passed to secure the human Rights of tribes to protect their ancestors. It was not intended, and should not be used, as a backhanded way to accomplish scientific study of questionable merit under the guise of determining cultural affiliation.

Thank you.